Federal Court  Cour fédérale

Date: 20171220

Docket: IMM-876-17

Citation: 2017 FC 1175

Ottawa, Ontario, December 20, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

BINGQIU LIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On May 22, 2016 the Applicant, Mr. Bingqiu Lin, arrived in Canada and claimed he is a Convention refugee or a person in need of protection under the *Immigration and Refugee Protection Act,* SC 2001, c 27 at sections 96 and 97(1) [IRPA]. When the Refugee Protection Division [RPD] dismissed his refugee claim on August 24, 2016, the Applicant appealed that

decision to the Refugee Appeal Division [RAD]. The RAD dismissed his appeal on February 1, 2017.

[2] The Applicant says the RAD decision includes errors such as failing to admit relevant new evidence, unreasonably deciding documents are fraudulent, and impugning his credibility. He now asks this Court to judicially review the RAD decision.

[3] Because I find the RAD decision is transparent, justifiable, and intelligible, and that the RAD did not err by excluding the new evidence, nor breach the Applicant's right to procedural fairness, I am dismissing the judicial review for the reasons that follow.

II. Background

[4] The Applicant says he lived in the People's Republic of China and is fearful to return there because he will be arrested and jailed for practicing his religion freely.

[5] The Applicant alleges that in August 2015, on the advice of his friend Guo Xiu, he joined a Church whose members are known as "Shouters" as a way to reduce stress. His narrative alleges that on March 26, 2016 four Shouters, including him, were in a public park handing out Shouters informational leaflets. What he alleges happened next is that the Public Security Bureau [PSB] arrived and arrested two of them, but the Applicant managed to flee and went into hiding. He says his employer was told he is a Shouter and fired him. He also alleges the PSB searched for him at his home three times and issued a summons which they gave to his wife.

[6] As a result, the Applicant says he left China on May 12, 2016 and began his journey to Canada with the help of a smuggler. He alleges he was able to exit China using his own passport, which was stamped, but not scanned, at the airport. The Applicant's evidence is that before arriving in Canada, the smuggler told him to destroy the passport and then took all his travel documents including his boarding passes. The Applicant says that his friend Guo Xiu was arrested while trying to leave China.

[7] The Applicant arrived in Canada on May 22, 2016 and made a refugee claim. On July 18, 2016, his RPD hearing took place. The RPD decision, issued on August 24, 2016 dismissed his claim because it found 1) he is not a genuine adherent of the Shouters; and 2) he is not wanted by the Chinese authorities.

[8] The Applicant appealed to the RAD and on February 1, 2017, the RAD dismissed his appeal by confirming the RPD decision.

III. Issues

[9] The issues put forward by the Applicant are:

A. Did the RAD err in not allowing all of the new evidence put forward by the Applicant?
B. Did the RAD err in its assessment of the Applicant's documents, specifically, the Applicant's letter of termination and summons?
C. Did the RAD err in impugning the Applicant's credibility because he did not tender his passport or other travel documents?

D. Did the RAD err in finding that the Applicant could not exit China on his own genuine passport if he was wanted by the PSB?

E. Did the RAD err in its assessment of the Applicant's *sur place* claim?

IV. Standard of Review

[10] The standard of review that applies to RAD decisions is established by the jurisprudence, and is reasonableness (*Canada (Minister of Citizenship and Immigration v Huruglica*), 2016 FCA 93 at para 35).

[11] The standard of review for procedural fairness issues is correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

V. Analysis

A. *Did the RAD err in not allowing some of the new evidence put forward by the Applicant?*

[12] The Applicant argues the RAD should have admitted all the newly submitted evidence. The evidence submitted by the Applicant to the RAD includes: a letter dated August 7, 2016 from the Church in Toronto with undated photos; a letter from Bi Lan Wang (wife of Guo Xiu) dated September 6, 2016; Bi Lan Wang's Chinese Resident Identity Card; and a jail visitor card for Min Jiang Prison of Fujian Province.

[13] Only the August 7, 2016 letter from the Church in Toronto was admitted into evidence. Yet the Applicant argues the letter from Guo Xiu's wife and the jail visitor card also met the

newness test because both are dated after the RPD hearing, and both contain information that was not available at the hearing.

[14] According to section 3(3)(g)(iii) of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules], the Applicant must explain how the new evidence satisfies IRPA section 110(4), and how it relates to the Applicant. Section 110(4) of the IRPA says that new evidence is evidence that: 1) arose after the RPD rejected the applicant's claim; 2) was not reasonably available before the RPD hearing; or 3) that could not reasonably have been expected to be presented at the RPD hearing. As pointed out by the RAD, if the evidence meets the section 110(4) requirements, then the *Raza v Canada (Minister of Citizenship and Immigration),* 2007 FCA 385 factors of credibility, relevance, and newness apply. Materiality is addressed in section 110(6) of the IRPA.

[15] In this judicial review, the Applicant argued that the evidence is relevant because it is evidence of a similarly situated person. Yet, his submission to the RAD provided no explanation as to why the letter about Guo Xiu is relevant to the Applicant. The Applicant only said "this new evidence and the evidence introduced above further corroborates the [Applicant's] claim, and adds credibility to the evidence that the Board Member previously rejected." This lack of explanation led to the letter from Guo Xiu's wife and jail visitor card being dismissed as irrelevant.

[16] It is not for the Applicant to now bolster his argument by providing me with the explanation of why the evidence is relevant to him. I cannot reweigh the evidence or accept new

evidence in a judicial review. While I believe the evidence could be relevant because it shows the situation of a similarly situated person, the problem is the Applicant only submitted this argument for the first time at the judicial review hearing. Since this is the first time this argument has been raised, it cannot affect the reasonableness of the RAD's decision.

[17] Furthermore, even if the Applicant had followed the RAD Rules, an unreasonable decision about this evidence would not affect the decision as a whole. The reason the RAD dismissed the claim is due to credibility issues, so evidence of a similarly situated person is not determinative. Neither the RAD or the RPD continued their analysis to the point to where evidence of what happened to other Shouters became relevant.

B. *Did the RAD err in its assessment of the Applicant's documents, specifically, the Applicant's letter of termination and summons?*

[18] The Applicant submits the RAD breached his right to procedural fairness by not giving him a chance to respond to a new issue. This alleged new issue arose when the RAD found additional reasons to believe his summons and letter of termination are fraudulent. The Applicant relies on *Ching v Canada (Minister of Citizenship and Immigration*), 2015 FC 725 [*Ching*] and *Kwakwa v Canada (Minister of Citizenship and Immigration),* 2016 FC 600 [*Kwakwa*] for the proposition that an applicant must be allowed an opportunity to respond if a new issue is raised.

[19] This Court has previously held that when the RAD raises a new issue, procedural fairness dictates the Applicant be notified and allowed an opportunity to make submissions (*Ching* at para 71). Similarly, in *Kwakwa* Justice Gascon held that Mr. Kwakwa's right to procedural fairness was breached because the RAD had formed new arguments, implausibility findings, and

reasoning during its decision, without allowing him an opportunity to respond (*Kwakwa* at paras 2-3). Justice Gascon explained at para 24:

> In other words, the RAD is entitled to make independent findings of credibility or plausibility against an applicant, without putting it before the applicant and giving him or her the opportunity to make submissions, but this only holds for situations where the RAD does not ignore contradictory evidence or make additional findings or analyses on issues unknown to the applicant.

[20] Although the Respondent submits factual findings are not issues, the *Kwakwa* decision does not distinguish between factual issues and legal issues.

[21] As submitted by the Applicant, in *Ching* this Court cited to *R v Mian*, 2014 SCC 54 [*Mian*], where the Supreme Court of Canada [SCC] defined "new issue" at para 30:

> it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. **Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties** (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.
>
> [Emphasis added.]

[22] While the RAD may have made factually distinct findings, the issue of document genuineness was the legal issue in both hearings (and therefore not legally and factually distinct as required by the SCC in *Mian*). Therefore, the issue was already known to the Applicant, and I find the Applicant failed to show how the RAD breached his right to procedural fairness.

(1) Document Analysis

[23] The Applicant, relying on this Court's decision in *Cai v Canada (Minister of Citizenship and Immigration*), 2015 FC 577 at paras 16-17 [*Cai*], submits there are three reasons the RAD did not overcome the presumption of authenticity of foreign government documents. First, the Applicant says that the summons is for an interrogation, so it may not contain an offence (in other words, the Applicant might not have been criminally charged at that point). Second, the Applicant argues that the Red Seal of Issue on the summons shows the RAD that it received approval from an in-charge officer, and means it was approved by a person in authority. Third, the Applicant submits the RAD can only speculate that a private company would cite to regulation in a letter of termination.

[24] The general rule is that foreign government documents are presumptively valid (*Cai* at paras 16-17). This presumption cannot be rebutted simply for the reason that fraudulent documents are easy to obtain. Some evidence or additional reasons are required and there must be a reason for questioning the absence of security features.

[25] In this case, the RAD did have a reason to rebut the government document. Specifically, it reviewed *The Public Security Administration Punishment Law of the People's Republic of China* at article 82. Article 82 requires approval from an in-charge person and to "inform the summons of the reason and grounds for summoning." Since these requirements were missing on the Applicant's summons, the RAD found this was enough to rebut the presumption.

[26] The Applicant also argues the document is an interrogation summons, and likely does not require an actual charge. However, the RAD came to the conclusion it was a public security summons by comparing the summons to samples in the documentary package. Next, the RAD reviewed article 82 to determine the features of this type of summons. Though the Applicant offered other possibilities, the RAD decision regarding the summons was reasonable and based on evidence.

[27] While the RAD did not discuss the presence of the Red Seal of Issue on the summons, in this case, a lack of security features or stamp is not what led the RAD to find the documents were fraudulent. After discussing the article 82 requirements, the RAD decision explains the summons "attempts to cite the correct section for the issuing of a summons but is deficient in citing the actual substantive offence." It is the fact that the document tries, but fails, to cite the correct offence that led to the RAD finding it is fraudulent.

[28] As for the letter of termination, the Applicant submitted the RAD unreasonably declared that the document is fraudulent because no evidence was put forward that a private company would cite to a regulation. In this case, the RAD states that there is no reference to which regulation and "according to the *Public Security Administration Punishments Law of the People's Republic of China* the Shouters are not specifically mentioned." Without the Shouters mentioned as a reason to be punished in China, it is reasonable that the company would have cited the regulation relied upon to terminate the Applicant. The RAD considered this along with the flaws of the summons and found on a balance of probabilities that the termination letter was

also false. The RAD's explanation and reasoning is reasonable even though I may have decided differently that is not the test on a judicial review.

C. *Did the RAD err in impugning the Applicant's credibility because he did not tender his passport or other travel documents?*

No Travel Documents

[29] The Applicant submits the RAD made three errors while analyzing why he has no passport or travel documents.

[30] First, the Applicant argues the RAD failed to provide any reasons why it is unpersuaded by his allegations that a smuggler told him to destroy his passport.

[31] Second, the Applicant argues the RAD improperly relied on *Elazi v Canada (Minister of Citizenship and Immigration*) (2000), 191 FTR 205 (FC) because "the issues of identity and proof of journey which necessitated the passport in *Elazi* were not significant in the case at hand." He also distinguishes his situation by arguing he was more vulnerable because, while the *Elazi* applicant had already arrived in Canada, the Applicant was still in transit.

[32] Third, the Applicant argues the RAD failed to consider the jurisprudence involving smugglers. Specifically, the Applicant submits there is jurisprudence holding that "a negative inference cannot be drawn against a refugee claimant for following the smuggler's instructions." In support, the Applicant cited to: *Kandot v Canada (Minister of Citizenship and Immigration),* 2003 FC 1275; *Takhar v Canada (Minister of Citizenship and Immigration),* 1999 Canlii 7544

(FC); *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4; *Rasheed v Canada (Minister of Citizenship and Immigration*), 2004 FC 587.

[33] The Applicant has cited to a plethora of case law illustrating a smuggler may very well instruct refugees to commit certain actions. Yet the RAD's decision found that commercial air travel does create records. These are records the Applicant could have obtained since he travelled on his own passport. If contacted, the airline may provide duplicate or other proof of a flight. But as the RAD points out, the Applicant made no attempt to obtain copies of travel documents after arriving in Canada. I do not find that requiring the Applicant to try to obtain proof he was present in China during the material time is unreasonable in this situation.

D. *Did the RAD err in finding that the Applicant could not exit China on his own genuine passport if he was wanted by the PSB?*

[34] The Applicant submits the RAD erred by concluding a wanted person cannot flee China using his own passport. The Applicant says this is an error because the RAD 1) misinterpreted the documentary evidence; 2) ignored contrary evidence; and 3) ignored binding case law.

[35] First, the Applicant argues the documentary evidence was misinterpreted because the evidence doesn't say a departure will always be prevented. In addition, the Applicant alleges his passport was never scanned, so it couldn't trigger the Golden Shield database. He says this distinguishes the evidence because the only examples the RAD cited involved people with scanned passports.

[36] Second, the Applicant submits the RAD and RPD both ignored an entire disclosure package.

[37] Third, the Applicant relies on case law to illustrate it is plausible a person may exit China with their own passport through bribery: *Sun v Canada (Minister of Citizenship and Immigration*), 2015 FC 387 [*Sun*]; *Ren v Canada (Minister of Citizenship and Immigration*), 2015 FC 1402; *Zhang v Canada (Minister of Citizenship and Immigration*), 2008 FC 533; *Yao v Canada (Minister of Citizenship and Immigration*), 2016 FC 927; *Yang v Canada (Minister of Citizenship and Immigration)*, 2016 FC 543.

[38] The Applicant also submitted that "there is relevant and binding case law that holds that individuals wanted by the authorities in China can bypass border security using their own passports."

[39] In fact, the jurisprudence illustrates the Applicant is incorrect that there is *binding* case law. While *Sun* is similar factually to the case at bar, recent cases have distinguished it as old law based on particular evidentiary findings. For example, in *Chen v Canada (Citizenship and Immigration)*, 2017 FC 539 at para 29 [*Chen*], Justice Mosley distinguished *Sun* because the applicant in *Chen* did not provide evidence about bribing customs agents and no explanation was provided about how the exit from China was arranged. In another case, *Yan v Canada (Minister of Citizenship and Immigration)*, 2017 FC 146 at para 20, Justice Brown explained:

> the country condition information before this RAD was more up to date and was not before the Court in the earlier decisions, specifically in regard to China's exit controls and the Golden Shield. In my respectful view, decisions concerning China's exit

> controls based on earlier or different country condition evidence, while important for the principle that each case must be determined on the evidence, are not determinative of subsequent applications such as this. These determinations are both fact-driven and findings in respect of which the RPD and RAD are entitled to a degree of deference given they are both specialized tribunals.

[40] In the instant case, the RAD's decision addressed the Applicant's allegation that his passport was not scanned. Based on the evidence, the RAD found that although the Applicant might get around some checkpoints, it is highly unlikely he could get around all checkpoints. For instance, the RAD said since the travel infrastructure is completely computerized, "it is reasonable the [Applicant] would not be issued a boarding pass or would otherwise be prevented from exiting China if he was wanted by the authorities."

[41] The general rule is that the decision maker is assumed to have reviewed the relevant evidence. While the Applicant submits their disclosure package titled "Refugee Claimants Using Valid Passports to Flee China" was ignored, the RAD said it reviewed the documentary evidence before it, but found little documentary evidence with "relevant information which applies to activities to overcome security measures in place border controls."

[42] In this case, the exit is relevant insofar as it is proof of whether or not the Applicant is a wanted man in China. Further, the Applicant's passport was not just valid, it is his own passport. The Applicant did not convince me or show me anything specific to indicate that the package was ignored. This is not a reviewable error.

E. *Did the RAD err in its assessment of the Applicant's* Sur Place *claim?*

[43] The Applicant submits the RAD erred in finding that attending the Church in Toronto does not put him at risk. He says the evidence illustrated the Church is the same denomination or philosophy as Shouters and the RAD misinterpreted the letter the Church in Toronto wrote. He says he is a practicing Shouter and there is no evidence to the contrary, but that there is plenty of evidence to prove Shouters are persecuted in China. Therefore, the Applicant submits the RAD decision was incorrect and unreasonable.

[44] The Applicant's submissions did not address the addendum of the Church in Toronto's letter:

> in regards to the present day so-called **'Shouters Church'** sect of China, we would like to state for the record that the Church in Toronto is not affiliated in any way with the aforementioned group
>
> [Bold emphasis in original; Underlined emphasis added.]

[45] It is open for the RAD to give more or less weight to the letter or documentary evidence, including this statement from the Church in Toronto. The Applicant is asking this Court to reweigh the evidence, which cannot be done. Furthermore, the Applicant himself submitted the letter containing this addendum information to the RAD. The RAD did not commit a reviewable error.

[46] In regards to the Applicant's submission that even ordinary Christians face future persecution in China, the Respondent submitted this argument was brought for the first time at the Federal Court hearing and so must be disregarded.

[47] However, since the RAD did decide that "[t]here is no persuasive evidence that he would be unable to practice Christianity if he returned to China," it is part of the RAD decision and reviewable before this Court.

[48] The RAD decision did not find there was *no* evidence, but rather found that there was no *persuasive* evidence that the Applicant would be unable to practice Christianity in China. So the Applicant's allegations that the RAD ignored this evidence misstate the RAD decision. I see no reviewable error and again will not reweigh evidence.

[49] I am dismissing this application as the RAD decision is reasonable and I did not find any procedural unfairness.

[50] The parties did not present any Certified Questions and none arose.

JUDGMENT in IMM-876-17

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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